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Discovery Procedures and the Selection and Training of Arbitrators: A Study of Securities Industry Practices

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DISCOVERY PROCEDURES AND THE SELECTION AND TRAINING OF ARBITRATORS: A STUDY OF SECURITIES INDUSTRY PRACTICES†

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Two significant Supreme Court decisions in the past few years have dramatically altered the landscape of securities industry arbitration. In 1985, in *Dean Witter Reynolds, Inc. v. Byrd*,[1] the Court ruled that state law claims subject to pre-dispute arbitration agreements could no longer be appended to and adjudicated with federal securities claims arising out of the dispute. Rather, in consideration of the congressional intent to enforce arbitration agreements, as manifested in the Federal Arbitration Act,[2] the Court found that such state law claims would have to be resolved in arbitration. Two years later, in *Shearson/American Express, Inc. v. McMahon*,[3] the Court handed down a decision with an even greater impact than *Byrd*. Swayed by what it perceived to be the Securities and Exchange Commission's (SEC's) "expansive power to ensure the adequacy of the arbitration procedures employed by the [securities industry],"[4] the

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[1] 470 U.S. 213 (1985).

[2] 9 U.S.C. §§ 1-14 (1986).

[3] 107 S. Ct. 2332 (1987).

[4] *Id.* at 2341.

Court reversed a thirty-year precedent[5] that permitted claimants to avoid the consequences of pre-dispute arbitration agreements when their disputes involved claims arising under the Securities Exchange Act of 1934. The Court reasoned that because of the Commission's oversight powers, an investor's agreement to submit claims to arbitration does not constitute "an impermissible waiver" of the investor's rights under the 1934 Act.[6]

Together, these two Supreme Court decisions ensure that if customers enter into pre-dispute arbitration agreements with their brokers, they will be compelled to arbitrate all claims arising out of their relationship with their broker except perhaps those claims based upon the Securities Act of 1933.[7] In reaction to these judicial developments, more brokerage firms, recognizing the significance of the recent Supreme Court decisions, are requiring their customers to enter into pre-dispute agreements to arbitrate their claims. An SEC official reported in January of 1988 that "virtually every securities firm in the United States—at least of any appreciable size—uses predispute arbitration clauses, at least in contracts having to do with options and margin trading."[8] The official went on to say that many of the brokerage firms "if not most of them, have [pre-dispute arbitration agreements] in cash account agreements and most of the ones that don't yet have them in cash account agreements are in the process of putting them in."[9]

The impact of the new Supreme Court holdings in conjunction with the increased use of pre-dispute arbitration clauses is far reaching. On a very practical level, the result of these developments is an increased number of matters going to arbitration within the securities industry.[10] This expanded arbitration schedule will place a greater burden on the resources of the securities industry arbitration offices. Perhaps more significantly, however, the role of arbitration in the dispute resolution arena has been transformed. Securities industry arbitration, in its pre-

[5] This precedent had its roots in Wilko v. Swan, 346 U.S. 427 (1953).

[6] Shearson/American Express, Inc. v. McMahon, 107 S. Ct. 2332, 2341 (1987).

[7] Since *McMahon*, a number of courts have found that even 1933 Act claims are subject to pre-dispute arbitration agreements. *See, e.g.*, Rocz v. Drexel Burham Lambert, Inc., 154 Ariz. 462, 743 P.2d 971 (Ariz. App. 1987); Staiman v. Merrill Lynch, Pierce, Fenner & Smith, 673 F. Supp. 1009 (C.D. Cal. 1987).

[8] 20 Sec. Reg. L. Rep. (BNA) 101 (1988).

[9] *Id.*

[10] Even prior to the events surrounding the market break in October, 1987, the Director of Arbitration for the National Association of Securities Dealers estimated that the 1987 case load of the NASD would be 2,400, as opposed to the 1,587 cases in 1986. 19 Sec. Reg. & L. Rep. (BNA) 1657 (1987). This increase would reflect only a half-year impact of *McMahon* since that case was decided midway in 1987. By the end of 1987, the NASD's case load totaled 2,800.

sent configuration, was an outgrowth of a consumer protection outlook championed by the SEC in the 1970's.[11] It was anticipated that arbitration would be the adjudication route taken by the small investor with claims of limited dollar amounts who sought to avoid the expenses of federal litigation.[12] While the small investor still will be using the arbitration mechanism, so will the large investor who has complicated claims arising out of sophisticated trading strategies and who perhaps suffered extensive financial losses. The judicial process will no longer be available to this larger investor with a complex claim. It is unclear that the present arbitration system is adequate for both the larger, complicated cases and the traditionally smaller and simpler claims. If the system is not fully adequate for these newer participants, it is necessary to explore the kinds of changes that might be made to accommodate the system to its new players.[13]

RESEARCH OBJECTIVES

There are numerous aspects of securities industry arbitration that warrant some degree of reexamination as a consequence of the recent judicial developments. The two areas upon which this study has focused are the discovery process and the selection and training of arbitrators.

The area of pre-hearing discovery in any arbitration system is often problematic, reflecting the basic tension in the arbitration process. On one hand, parties to arbitration have a vital interest in being able to gather sufficient information prior to the hearing to present their cases effectively. On the other hand, a major attraction of arbitration is its economy and expeditiousness. These qualities are in part preserved by the abbreviated discovery process that is often employed in arbitration. Obviously, these qualities of economy and expeditiousness may suffer from expansion of the pre-arbitration discovery procedure.

The tension that generally exists in regard to discovery in any arbitration system is accentuated in today's securities industry arbitration.

[11] The SEC in 1977 voiced a "concern that there be more effective, efficient and economical dispute resolution procedures avilable to *individual investors*" (emphasis added). Exchange Act Release No. 13,470 [1977-78 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 91,136, at 87,905 (Apr. 26, 1977).

[12] The SEC's Office of Consumer Affairs identified the arbitration system's relatively greater utility for smaller, non-complex claims in suggesting that "when there is a substantial amount of money at stake, the investors will view litigation as a reasonable course to pursue . . . ." Exchange Act Release No. 12,974, [1976-77 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 80,907 at 87,106 (Nov. 15, 1976).

[13] In September, 1987, the Director of the SEC's Division of Market Regulation sent a thirteen-page, single-spaced letter to the various self-regulatory agencies that conduct arbitration suggesting changes that needed to be made in the arbitration mechanism in part as a result of the *McMahon* case [hereinafter SEC Recommendation Letter].

Litigants who once were able to rely upon the Federal Rules of Civil Procedure to provide the means to conduct necessary discovery are now confined to the discovery practices permitted under the Code of Arbitration Procedures. These litigants often seek an expansion of the discovery practices historically available in securities industry arbitration. The question that the securities industry needs to resolve is: "How far can current discovery practices be expanded before the arbitration process begins to lose its qualities of efficiency?" The study sought to identify the discovery practices that are available under the current arbitration regime. Further, it examined discovery practices that might be underutilized within the current system. Finally, it sought to explore the discovery practices that, while not currently available, may be desirable for participants in securities industry arbitration and the impact that such changes in discovery may have on the arbitration system.

The second focus of the study was the selection and training of arbitrators. Again, the need for such a study has been heightened by the significant restriction of opportunity for investors to access the courts for resolution of disputes with their brokers. The arbitration panel has replaced the judicial system. The arbitrator has become a substitute for the judge or judge and jury. It becomes highly important to know something about how the arbitrators are selected. What qualifications are found desirable? What is the quality of the arbitrators selected? What input do the parties to the arbitration have in the selection of the arbitrators? What formal or informal training do the arbitrators receive? How are ineffective arbitrators identified and removed from the arbitration pool? Finally, journalistic reports have suggested that there is a public perception that, because of their respective clients, securities industry arbitrators are subject to a pro-industry bias.[14] To evaluate this possible bias, the study sought to determine the degree to which the occupational client-base of arbitrators may suggest a pro-industry partiality. The study also sought to discover the frequency with which the perception of a pro-industry background results in challenging individual arbitrators.

METHODOLOGY

The subjects of the study were the arbitration systems of the National Association of Securities Dealers (NASD) and the New York Stock Exchange (NYSE).[15] Together, these two self-regulatory organizations (SROs)

[14] As examples of this journalistic coverage, *see* Zigas, *Can't Sue Your Broker? It's No Big Loss*, BUSINESS WEEK, June 22, 1987, at 128; Glaberson, *When the Investor Has a Gripe*, N.Y. Times, Mar. 29, 1987, § 3, at 1, col. 2.

[15] The directors of the arbitration offices of these two self-regulatory organizations made their staff available for this study and allowed information to be gathered for the study by their staff from their records. Without this cooperation, the study could not have been conducted in its present format.

conduct nearly 90%[16] of the arbitrations administered annually by SROs. While both of the SROs conduct arbitration hearings virtually around the nation, their arbitration administrative offices are more centrally located. The NYSE administers its arbitration activities from its New York City office. The NASD administers its arbitration activity from its New York City office, as well as from offices in Chicago and San Francisco. (The NASD will be opening another office in Florida.) Various activities in all four offices were examined for purposes of this study.

The nature of arbitration is such that it is difficult to effectively study its operation. Arbitration is not a public dispute resolution system. It is a contractually arranged, private method that two or more parties agree upon to settle conflicts. Because of the way arbitrations are conducted by the securities industry, the parties to the arbitration, the conduct of the arbitration hearing, and the results of the arbitration are not matters of public record. Since the files of the arbitration proceedings are not open to the public for inspection, studies of the operation of the arbitration system generally must be conducted through intermediaries who do have access to the arbitration files. These intermediaries can cull information but cannot disclose identities. Much of the information gathered for this study, by necessity, was gathered first by staff attorneys with the self-regulatory organizations that conduct the arbitrations and was then organized and analyzed by the author.

The staff attorneys typically serve as neutral facilitators of the arbitration mechanism. They receive filings, put together arbitration panels, seek rulings by arbitrators on discovery requests, schedule hearings, commence the arbitration hearings, explain procedures to the parties, provide advice to arbitrators on procedural matters, and arrange for the transmission of the arbitrators' award. In performing these multiple services, they are typically more familiar with the arbitrators and the arbitration matters than any of the other participants in the arbitration process. While they generally are proponents of the arbitration process, they are also typically perceived by the parties to the arbitration as impartial. In light of their broad contact with the arbitration system and their prescribed role of neutrality, they are extremely valuable sources of information for a study of the arbitration system.

This study was comprised of three major components. The cooperation of the staff attorneys was critical for the completion of two components. The third component depended to a greater extent on the cooperation of attorneys who have represented clients in arbitration. The first component of the study involved interviewing administrators[17] and

[16] Based upon figures obtained from the Securities Industry Conference On Arbitration, Report #5, 1986.

[17] The administrators interviewed were the Director of Arbitration at the NASD and the Assistant to the Director of Arbitration at the NYSE.

staff attorneys of the two SROs regarding aspects of selection and training of arbitrators, as well as aspects of the discovery procedures employed in their respective arbitration system. Before the interviews were conducted, the author met with the interviewees to discuss the purpose of the study and to instruct them on how to prepare for the interviews. The interviewees were provided copies of six sets of questions (see Appendices A to F, i.e., Items 1 to 6) to which they would later be asked to respond orally. Appendix A (Item 1) questions dealt primarily with the organization and selection of the national pools of arbitrators. These questions were directed toward the administrators and those staff attorneys who might be involved in the selection of the pools. Appendix B (Item 2) questions, which related to the selection and training of individual panels, were directed to the staff attorneys. Appendix C (Item 3) questions related to the information that was maintained regarding arbitrators; these questions were directed primarily to the staff attorneys. Appendix D (Item 4) questions regarding training of arbitrators were directed both to the administrators and to the staff attorneys. Appendix E (Item 5) questions related to the information regarding arbitrators that is transmitted to the parties to the arbitration. These questions were directed both to the administrators and the staff attorneys. Appendix F (Item 6) questions dealt with discovery practices and were directed to the staff attorneys.

The interviews were conducted primarily by phone. A limited number were conducted in person. The questions from Items 1 to 6 were asked orally in a conversational context. No attempt was made to duplicate the precise language of the question that appears on the several questionnaires; however, the interviewees generally had the forms in front of them.[18]

In addition to the administrators in each of the two SROs, a total of nine staff attorneys were interviewed for this study. The staff attorneys were requested to review the ten most recent customer/broker arbitration matters they had coordinated prior to the interview. The answers to the questions asked were to be taken from their experiences with those matters. The answers were thus based upon a total of 90 case matters.

The second component of the study involved the collection of objective information regarding a sampling of arbitrators. The information sought regarding the arbitrators related to the arbitrator's background, frequency and longevity of service as an arbitrator, and potential conflicts based upon the arbitrator's professional client base (see Item 3.1,

[18] Some of the language in the questions was altered after the first interviews. For example, it was immediately recognized that Item 6, question 4, was logically inconsistent. The question asked if the staff attorney "require[s]" a voluntary exchange of documents. The question was changed to ask if the staff attorney "urged" a voluntary exchange.

Appendix G). Information was gathered regarding 174 arbitrators (88 from the NASD files and 86 from the NYSE files).[19] The information was culled from the files of the SROs by staff attorneys. The attorneys entered the information onto Item 3.1 forms. An effort was made to divide the arbitrators studied among three or four geographic regions for each of the SROs. A further attempt was made to include in each geographic sample arbitrators from different size cities. Finally, an attempt was made to select the arbitrators by a reasonable random sampling technique. For instance, if 10 were to be studied and the pool contained 150 arbitrators, information would be collected regarding every fifteenth arbitrator on the list. The data collected was tabulated and summarized.

The third component involved collecting information from attorneys who regularly represent clients in arbitration procedures. A list of thirty-seven attorneys, many of whom practice in arbitration matters at both of the SROs, was provided. The directions as to the selection process were to identify attorneys who were familiar with arbitration and who would be broadly representative of the attorneys who serve in the arbitration process. Thirty-six lawyers were sent letters explaining the purpose of the study and which asked the recipient to complete (anonymously, if they so chose) a survey regarding discovery in the arbitration process (see Appendix H). The survey asked for information regarding the number of years the respondent has been representing clients in arbitration and the number of arbitrations in which the respondent has been involved. In addition, the survey sought to determine whether the respondent found the present discovery system adequate and what changes might be made to make it more responsive to the needs of the respondent and his or her clients. The information gathered from this survey was opinion or perhaps anecdotal. What was sought was some input from the people who use the system—rather than significant statistical data. Of the thirty-six surveys mailed, twenty recipients completed and returned the forms (often accompanying their responses with supplementary letters).

The interviews and other information gathering processes upon which this study is based were conducted during the Fall of 1987.

FINDINGS, ANALYSIS, AND COMMENTARY

Selection of Arbitrators

Initial Solicitation. There are two central components to the selection process of arbitrators. First, there is a selection procedure that creates a pool of available arbitrators for each of the SROs. Second, there is a

[19] No effort was made to eliminate possible duplications when arbitrators worked for both SROs. It was felt even if there were duplications, the information would still be valid for the individual SROs.

procedure for selecting the members of the panel for a specific arbitration matter. Both of these procedures are largely the same for the two SROs which were the subject of this study. The selection of the pools is discussed in this section. The selection of the panels is discussed below.

Both of the SROs arbitrator pools are divided into sub-pools arranged by cities in which arbitrations are conducted. The size of the sub-pools may range from 15 arbitrators in small cities in which few arbitrations occur to perhaps 500 or more arbitrators in New York City where the greatest number of arbitrations are held. The method for selection of the pools involves a two-step process. At the first step, potential arbitrator candidates are identified by the staff attorneys. These candidate names are forwarded to the directors of arbitration for their approval, with ultimate approval being required by an SRO oversight board. Recommendations also, at times, come directly to the directors from other arbitrators or persons familiar with the arbitration system. As a practical matter, it appears that virtually all candidate names forwarded by the staff attorneys are approved by the directors. Approval by the director is reviewed by the oversight board, and the vast majority of names are approved.

Before being placed in an arbitration pool, potential arbitrators are asked to complete a biographical resume for the SRO. Both SROs in 1987 expanded the biographical information that they collect regarding arbitrators. At the time that the interviews for this survey were conducted, the information gathered by the different SRO offices varied. In each instance, however, the arbitrator candidate was asked to list previous employment experience, education, professional and business organizations of which the candidate was a member, brokerage firms at which the candidate maintained an account, business relationships between the candidate or the candidate's employer and the securities industry, and whether the candidate's professional license or registration had been revoked or suspended. Information that was collected by some offices, but not all, included teaching experience of the candidate, previous arbitration experience, books or articles published by the candidate, and the candidate's familiarity with specific securities legal issues and specific financial instruments.

The staff attorneys obtain names to forward to the directors by a variety of methods. The most commonly mentioned manner by which candidate names were obtained appeared to be through the recommendation of arbitrators or other professionals involved in arbitration with whom the staff attorney came into contact. One SRO has sought references from local bar associations and chambers of commerce. The other SRO has gotten references from a series of educational forums which it has conducted in various cities.

When asked what qualities the staff attorney looks for in recommending a person as an arbitrator, some staff attorneys emphasized an expertise in law or securities or accounting or business. Others emphasized personality qualities, such as a "judicial termperament" or a commitment to finding a "fair solution" or a "public-minded" spirit. Almost all staff attorneys interviewed suggested, in one fashion or another, that it is really difficult to determine who would make a good arbitrator until that person actually sits on a panel. Most candidates are "given a shot" to see how they actually work out on a panel.

Since it is difficult and perhaps impossible to judge a person's abilities as an arbitrator until that person sits as an arbitrator, the quality of the arbitration pool can be better maintained by an on-going quality control mechanism than by the initial recommendation system. Two conclusions can be drawn from these observations. First, it is critical that the SROs have in place an efficient, comprehensive and continuous mechanism for evaluating arbitrators and for dismissing poor arbitrators. The operation of the present evaluation system and the need for change are discussed below. Second, if there is an effective dismissal system in operation, and if little can actually be known about a candidate's quality as an arbitrator prior to service, then the SROs might be wise to cast the broadest possible net in seeking candidates to serve as arbitrators. General solicitations in bar bulletins or chamber of commerce publications might be appropriate. Even if such broad solicitations result in a less qualified initial pool than a pool based upon personal recommendations, an effective evaluation system would eliminate poorly qualified arbitrators who make it through the initial screening.

On-Going Quality Control. Both SROs typically conduct their arbitrations with the staff attorney present at the hearing for either all or some portion of the time. The staff attorney's presence at the hearing, along with the contact that the staff attorney has with the arbitrators during the discovery period, affords the staff attorneys an opportunity to evaluate the arbitrators. Both of the SROs employ an arbitrator evaluation system, but it was not clear that either of the evaluation systems is applied with uniformity by the respective staff attorneys. Both of the SRO staff attorneys write comments about the arbitrators after the hearings on the profile cards that are maintained on the arbitrators. The focus of these comments appears to vary from attorney to attorney. Areas of focus include: temperament, skills, willingness to sit for an extended time, abilities to serve as a chairperson, biases, attentiveness, physical incapacities that might limit performance (e.g., hearing problems), willingness to serve on a panel, attitude to the arbitration program, ability to work well with others, and willingness to make oneself available to sit as an arbitrator. Both SROs rely either somewhat or to a considerable degree on word-of-month evaluations from one staff attorney to another in order to evaluate

arbitrators' performances. One SRO employs weekly meetings during which the abilities of new arbitrators are discussed.

One of the SROs has developed an arbitrator review system in which the arbitrator's performance is evaluated in terms of ten rankings of proficiency. The top ranking is the "extremely competent" arbitrator. To be so evaluated, the arbitrator would have to be extremely competent in all areas of performance. There are three categories of "above average" rankings; one category of "average" ranking for the arbitrators who are prepared, conscientious, and interested in serving; one category for "erratic" performers; two categories of below average rankings and one category for arbitrators who should be eliminated from the pool. There is also a ranking for the arbitrators who have not yet been used and consequently have not been evaluated in terms of performance. At the end of each hearing, the staff attorneys are asked to make comments about the arbitrators when relevant and to revise their respective rankings when necessary.

Some suggestions may be made as to how the SROs could tighten and streamline their evaluation process. A checklist of relevant areas of comment should be reviewed by the staff attorneys in regard to each arbitrator immediately following a hearing. Comments would be entered on the profile card in response to evaluation points raised on the checklist. Comments need not be entered upon a profile card if the staff attorney finds nothing of relevance to say. However, with the use of a checklist, there will be a uniform evaluation of the arbitrators in terms of areas of strengths and weaknesses that have been reviewed.

A bottom line evaluation of each arbitrator should also employed by both SROs in conjunction with the comment checklist. It might be simplest to employ a short descriptive rating system. The system might be composed of as few as four evaluations, such as: "do not use again," "use only if other arbitrators are unavailable," "use," "use as often as available." While different staff attorneys will have different notions as to which arbitrators will satisfy specific categories, the evaluations themselves are not ambiguous. When these "bottom-line" evaluations are linked with the comments, a complete picture of the arbitrator's potential performance could emerge.

With the expansion of the arbitration case load, coupled with turnover of staff attorneys, the use of word-of-mouth evaluations might become less feasible. The inapplicability of word-of-mouth evaluations might place greater emphasis on the need to develop a uniform written evaluation system. However, even if a perfect written evaluation system were devised, some organized, group evaluation discussions would remain desirable. A monthly meeting in each office to discuss arbitrators would keep the evaluation system current. As the dynamics of arbitration change, the qualities of a good arbitrator might also change. The staff attorneys need

to discuss among themselves, with some frequency, what they are individually finding as attractive or unattractive qualities in arbitrators. New ideas that are developed in these discussions can be reflected in revised comment lists. New ideas might also affect staff attorney evaluations.

These evaluation proposals should be thought of as illustrative as opposed to definitive solutions. If these proposals prove impractical or even impolitic, other systems should be devised. It seems relatively clear that the quality of the pool of arbitrators is going to be most effectively maintained through an ongoing evaluation process rather than an initial selection process. This fact places a premium on improving the quality of the existing evaluation system.

The Commission, in its recent recommendations to the SROs,[19.1] suggested that an evaluation procedure be developed which would include evaluations from the parties to an arbitration, from their counsel, and from other evaluators. The author of this study believes that such an evaluation approach would place undesirable pressures on arbitrators. However, should such an evaluation system be instituted, it should be maintained separately from the evaluation system employed by the staff attorneys to be used for future selection of panels. Only the staff attorneys have the breadth of experience and sufficient disinterest in outcome to allow a relatively neutral and consistent evaluation of the arbitrators. It is this evaluation that the staff attorneys need to formalize to assist themselves in the selection of future panels.

Quality and Scheduling Conflicts and the "Professional" Arbitrator. It is interesting to observe that of the many evaluative comments that are regularly recorded regarding arbitrators' performances, one concerns their availability to serve as opposed to their abilities when they serve. What this evaluation indicates is that some arbitrators, who are otherwise qualified to serve, do not consent to serve because of scheduling conflicts or other reasons. It is, of course, not surprising that a portion of the arbitrators in the pool are evaluated as not being readily available to serve. That is a necessary condition of a volunteer arbitration pool. However, as the need for qualified arbitrators increases, the SROs might want to consider some creative approaches for encouraging qualified arbitrators in the pool to make themselves available for panels when requested.

Clearly, any plan to stimulate participation must take into consideration financial inducements and sacrifices. The American Arbitration Association maintains a policy of requesting its arbitrators to serve without compensation only for matters that last no longer than a day. Beyond that point, the parties to the arbitration are expected to pay the arbitators a daily fee. While the SROs compensate arbitrators with an honorarium

[19.1] *See supra* note 13.

for each day they serve on an arbitration panel, recognition is not made of the fact that, for arbitrators with other daily occupational commitments, the multi-day arbitration is a greater sacrifice than arbitration matters that last but one day. The SROs might want to consider paying a more meaningful fee than the honorarium to arbitrators who sit on multi-day panels.[20] Another approach for responding to the scheduling conflicts of arbitrators is to commit to use certain arbitrators for a specified number of days at prearranged intervals (for example, the first week in January and the first week in July each year). The SROs would then attempt to schedule sufficient arbitrations during that period to utilize the time of the arbitrators who are so committed. The arbitrators, who would leave that time open, would be compensated by the SROs whether or not they ultimately served during those times.

A concern that is frequently raised by staff attorneys when proposals are made to regularize the use of arbitrators or to provide arbitrators with other than honorarium compensation is that the arbitrators will then become "professional." The term appears to mean different things to different staff attorneys. One analysis of the term was that the arbitration process would lose its volunteer nature. With that volunteer nature presumably is associated a certain amount of commitment and enthusiasm which might be lost with professional arbitrators. It is possible, however, that securities arbitration has grown so much in size and complexity that it can no longer afford the luxury of being a volunteer operation. As with labor arbitration, and certain areas of commercial arbitration, it is perhaps time for the securities industry to consider developing a pool of professional arbitrators who would be able to provide the availability and expertise that will allow several thousands of matters to be arbitrated annually. Were the decision made to develop a more "professional" pool of arbitrators, there is no reason to believe that the motivation could not be generated to produce a continued high level of enthusiasm and commitment.

Another concern that was raised by the staff in regard to professional arbitrators is that the frequent use of the same arbitrators could provide an advantage for industry litigants. It is thought that since industry counsel frequently participate in arbitrations, they would be able to discern "track records" of specific arbitrators who serve frequently. Consequently industry counsel would be better able than claimants' attorneys to challenge arbitrators and/or to prepare their arguments for certain arbitrators. While this concern is reasonable, anecdotal evidence suggests

[20] This suggestion is made in this paper, *infra*, in the context of discussing ways to increase the length of service by arbitrators. The author feels compelled to disclose that he serves as an arbitrator, and thus the suggestion is, to some degree, self-serving.

that the claimants' bar is equally capable of developing dossier information regarding arbitrators. In a number of large cities, claimants' attorneys have already developed dossier information about arbitrators who sit with regularity. This information is shared among claimants' attorneys. The repeated use of a particular adjudicator is not a unique occurrence. In other adjudicatory systems, the tribunal "judge" sits with regularity and thus his or her characteristics can be recorded by the litigants. The qualities of non-predictability that are lost by the repeated use of an adjudicator are balanced against the fact that the resolution arena is gaining a more experienced adjudicator.

Information Regarding the Composition of the Arbitration Pool

Attorney Arbitrators. The professional background of the arbitrators selected as public arbitrators demonstrates a clear preference by the SROs for attorneys. Eighty-seven percent of the public arbitrators of one SRO were attorneys while 58% of the public arbitrators of the other SRO were attorneys. The study did not seek to determine whether the attorney arbitrators had experience in securities law. Anecdotal evidence would suggest, however, that most, but not all, of the attorney arbitrators have some background in securities law. The industry arbitrators for both of the SROs included a not insignificant percentage of attorneys. One of the SRO's pool of industry arbitrators was comprised of 18% attorneys and the other SRO's pool was comprised of 12.5% attorneys. Industry attorney arbitrators might or might not be practicing. Industry attorneys who sit as arbitrators may include in-house counsel at brokerage firms as well as attorneys who have entered the securities industry in a non-legal capacity. The SRO with the higher percentage of industry attorney arbitrators was the same SRO with the higher percentage of non-industry attorney arbitrators. This higher percentage of attorney arbitrators within one SRO perhaps reflects a greater SRO preference for attorney arbitrators.

Although most non-industry arbitrators and even a significant number of industry arbitrators are attorneys, the SROs may want to explore the continued use of any non-attorney arbitrators. Traditionally, arbitration has served as a dispute resolution device which brings to bear in the resolution of conflicts the commercial wisdom of persons who have personal familiarity with the operations of particular industry. Historically, legal wisdom was not a critical ingredient for a good arbitrator. Post *McMahon*, however, arbitration is becoming virtually a complete substitute for litigation of broker/customer disputes. It is not unreasonable to anticipate that participants in arbitration will begin to expect the same degree of legal analysis in arbitration that previously was afforded these participants in the judicial arena. Offering commercial wisdom as a substitute for legal analysis might not satisfy participants

in post-*McMahon* arbitration.[21] While non-attorney arbitrators are frequently competent to correctly analyze legal arguments, the public perception of arbitration as a satisfactory substitute for judicial litigation might suffer with the continued use of non-lawyers in decisionmaking roles pertaining to sophisticated legal matters. Beyond the issue of public image, as securities industry arbitration becomes more complex, often involving complicated legal theories arising under federal securities law, state common law, and the Racketeer Influenced Corrupt Organizations (RICO) Act, it might become increasingly difficult for non-attorneys to serve effectively as arbitrators. It is possible that there are a sufficient number of attorney arbitrators in public pools at present to accomodate the need for attorneys. The SROs, however, should explore this issue more thoroughly.

Professional Background of Arbitrators. The arbitrators used by the SROs, both industry and public, tend to have a significant number of years of professional experience. The average arbitrators for the two SROs had respectively 20.6 years and 26.2 years of professional experience. These figures indicate that persons who are volunteering to be arbitrators are typically well along in their professions. For each SRO, the number of years of professional experience of its arbitrators was roughly comparable for both industry and public arbitrators. In both instances, however, the public arbitrators tended to have slightly more professional experience than the industry arbitrators (22.7 years and 26.8 years respectively as opposed to 19.2 years and 25.6 years).

Statistics were compiled on the number of public arbitrators who did work compensated by the securities industry. This information was not always available on the arbitrator's profile card. In those instances where the information was obtainable, 56% and 24.4% respectively of the arbitrators of the two SROs did securities industry compensated work.[22] When the SEC made its recommendations to the SROs for changes in the arbitration system, it recommended that the SROs eliminate from their pools of public arbitrators all arbitrators who do securities industry compensated work.[23] Without evaluating whether the Commission's

[21] As securities industry arbitration matures, it is possible that the SROs will require arbitrators to decide matters on the basis of law rather than commmercial wisdom. Such a policy would place a greater emphasis on the need for arbitrators to be attorneys. For a discussion of this potential development, *see* Lipton, *The Standard on Which Arbitrators Base Their Decisions: The SROs Must Decide*, 16 SEC. REG. L. JOURNAL 3 (1988).

[22] These statistics should be viewed as somewhat "soft" since it is not certain that the attorneys who gathered the information had a common understanding as to what would constitute securities industry compensated work.

[23] SEC Recommendation Letter, *supra* note 13. An arbitrator was understood to be

recommendation is warranted by the circumstances,[24] one might note that the current composition of the pools of the SROs suggests that to implement the SEC's recommendation would require replacing, in one SRO, more than half of the current pool and, in the other SRO, nearly one-fourth of the current pool. Replacement of these numbers of arbitrators would involve a tremendous recruitment effort just to keep pace with present numbers in the pools. It is uncertain whether there are sufficient numbers of persons available with securities law experience, but without any securities industry client base, who would be willing to volunteer to serve as public arbitrators to accomodate the Commission's recommendations.

Length of Service as SRO Arbitrators. While the average SRO arbitrator has significant experience in his or her profession, the number of years that the average arbitrator serves on the SRO panel is considerably less extensive. The average length of service for public arbitrators is 2.6 years for one SRO and 4.0 years for the other SRO.[25] The average length of service for industry arbitrators is 2.8 years for the first SRO and 3.0 years for the second SRO. Only one of the SROs provided information regarding the number of arbitration matters that each arbitrator had conducted while serving on an arbitration panel. For that SRO, the average arbitrator was involved in 4.09 matters during an average tenure on the arbitration panel of 2.67 years. In other words, the typical arbitrator serves as an arbitrator on an average of one and a half matters each year over an average span of 2.6 years.

These statistics suggest that just at the point that the average arbitrator is becoming experienced in this field of dispute resolution, his or her service is discontinued. As the need for experienced arbitrators intensifies, it will increasingly benefit the SROs to be able to retain the services of their arbitrators for longer periods of time. Anecdotal information gathered during the interviews indicates that the SRO staff considers there to be several alternative motivations for arbitrators to volunteer their services. These include the opportunity to gain experience as practitioners in securities arbitration, the distinction of being asked to serve as a "judge," the satisfaction of providing public service, and, for some, the remuneration received as an honorarium. Those arbitrators who volunteer primarily to gain experience will lose their motivation to serve once that experience is gained. Those arbitrators who are ex-

doing securities industry compensated work if he received more than 10% of his compensation from the securities industry for the preceding two years. *Id.* at 3.

[24] *See infra* for a discussion of the reasonableness of the SEC proposal in light of current practices in challenging arbitrators.

[25] The average length of service for all arbitrators could be lowered by any recent increases in the pool of arbitrators. The new arbitrators would bring down the average figure.

hilarated by the sense of adjudicating disputes probably will also lose their motivation over time as the novelty of the experience wears off. The SROs must consider how to retain these categories of experienced arbitrators. It is possible that the SROs will have to increase their compensation to a level beyond an honorarium. The SROs should also consider surveying their arbitrators in an attempt to discover what would induce extended service.

Training of Arbitrators

The formal aspects of the education of the arbitrators by the SROs are somewhat limited. This limitation in formal training is probably necessary in light of the following facts: 1) the most beneficial learning results from an arbitrator's participation on a panel; and 2) because the arbitrators are serving in a volunteer capacity, it would be possible that few would be willing to expend the additional time to attend an education program without further inducements. Both SROs send to arbitrators, prior to their sitting on a specific matter, a package of information which includes: 1) a description of the arbitration process, 2) a copy of the Code of Ethics for Arbitrators in Commercial Disputes, 3) some description of the procedures for conducting an arbitration, 4) some discussion of the need for arbitrators to avoid conflicts of interest, and 5) a copy of the SRO's arbitration rules. In addition to this literature, one of the SROs has developed a series of arbitration forums that are produced in many of the cities in which that SRO conducts arbitrations. New and experienced arbitrators are invited to the forums to discuss both the nature of arbitration and the problems relating to arbitration. A training film is also shown at the forums.

Most staff attorneys indicated that they select panels with an eye toward mixing experienced with inexperienced arbitrators. This practice was followed in part to insure that panels are not too inexperienced, but also to serve as a learning mechanism for new arbitrators. Generally, new arbitrators would be sitting with more seasoned arbitrators when they first begin to serve an SRO. In addition, many of the staff attorneys indicated that they would not place a new arbitrator on a panel selected for a very complicated matter or a matter for which the claim involves significant sums of money. Another aspect then of the informal training process is to start arbitrators on easier matters with less of a dollar figure at stake.

Most of the staff attorneys indicated that just prior to a hearing they conduct a brief training session with the arbitrators. Different matters that were mentioned as being discussed with the arbitrators at that point include:

1) the order of arbitration;

2) the need for arbitrators' impartiality;
3) the need for arbitrators to determine ahead of time who will rule on evidentiary matters;
4) the advisability of requesting from the parties either briefs or oral presentations regarding points of law or operational matters for which the arbitrators need education;
5) the ability of the arbitrators to call executive sessions when they want to discuss in private with the other arbitrators questions or concerns that they might have;
6) the role of the chairperson; and
7) the fact that the arbitrators are not bound by the rules of evidence.

What is interesting to observe about the information that is provided by the staff attorneys just prior to the hearings is that it is not uniform. Different attorneys appear to focus upon different concerns. That differential in focus might be an appropriate response to the different backgrounds and abilities of different panels. However, that training differential might also reflect an absence of a codification of the relevant information that needs to be presented to the arbitrators immediately before a hearing. The SROs should consider surveying their staff attorneys regarding what each one considers important information to convey to arbitrators immediately before a hearing. A checklist could be prepared, and also perhaps a script for presentation by the staff attorney. The attorney need not engage all the topics on a checklist if the arbitrators to whom the presentation is made are sufficiently seasoned. In addition, the nature of some arbitration matters would not warrant a discussion of all of the items on a checklist. (For example, if no motions are to be made in a matter, there is no need for the staff attorney to discuss motions.) However, it would appear helpful for the staff attorney at each hearing to have a list of last minute training issues which could be discussed with the arbitrators.

Most staff attorneys indicated that at the arbitration they responded to questions from the arbitrators during executive sessions and at other times. Many of the questions dealt with procedural issues such as, "may a witness be heard out of order?," "how should the arbitrators respond to a party's motion?," or "can the arbitrators request a specific document from the parties?" Most staff attorneys indicate that they provide arbitrators with answers to procedural questions.

Most staff attorneys note that they frequently are asked substantive questions by the arbitrators during the hearings. A majority of the staff attorneys indicated that they advised the arbitrators to ask the substantive questions of the parties, allowing the parties to provide an answer either by brief or by oral presentation. Occasionally, staff attorneys indicated that they would provide the arbitrators with the parameters of the law on a specific issue and would then encourage the arbitrators to

resolve the issue within those parameters. It is interesting to note that some substantive questions appeared to be raised with regularity. For example, many staff attorneys noted that they were frequently asked whether arbitrators may provide punitive damages or attorney fees in an award. Again, the staff attorneys, on these issues, advised the arbitrators to seek briefs from the parties or, in some instances, the staff attorneys explained the parameters of the law. For these frequently raised substantive questions, the SROs might consider providing the arbitrators with briefing booklets that would explain the current state of the law on such matters.[26] Since the answers to these questions are not black and white, the briefing booklet would need to explain how different jurisdictions have responded to the questions and perhaps explain the factors that might motivate one response as opposed to another. Such briefing booklets would save considerable hearing time, as well as the time of the parties to the arbitration. The parties as well might be provided copies of the briefing booklet with the understanding that they could brief the same matter if they disagreed with the information provided in the booklet.

Selection of Panels

Input of Staff Attorneys. The initial decision as to which arbitrators will be selected from the arbitrator pools to sit on a specific panel is made by the staff attorney. Factors that the staff attorneys noted as influencing their decision included:

1) arbitrators who would not be subject to personal or professional conflicts with the parties;
2) expertise for a particular matter (e.g., did the matter involve a complicated securities law question for which it would be desirable to have an experienced securities lawyer);
3) strength of an arbitrator's character (staff attorneys indicated that they would typically avoid placing two strong willed arbitrators on the same panel. Similarly, they would avoid creating a panel on which none of the arbitrators were willing to make a decision);
4) many staff attorneys indicated that they attempt to mix the experience level of arbitrators;
5) some staff attorneys seek to insure that an attorney chairs a panel;
6) many staff attorneys indicated that they look for arbitrators who can get along with and work well with other arbitrators.

[26] The Securities Industry Conference on Arbitration (SICA) has indicated that it is preparing an arbitrator's manual, scheduled to be ready in 1988, which will discuss matters such as punitive damages and attorney fees. Letter from SICA to Richard G. Ketchum, Director of Market Regulation, Securities and Exchange Commission (Dec. 14, 1987).

Whatever selection criteria a particular staff attorney employs, the attorney is ultimately dependent upon the record that is kept regarding a specific arbitrator in order to make the selection. As discussed previously, the record keeping system relies to some extent upon word-of-mouth reports. The notations that are made on arbitrator profile cards are not uniform in notation style. In addition, when rating systems are employed, they do not appear to be as simple to use as they might possibly be. The institution of a simple rating system in conjunction with a checklist of observed qualities of arbitrators might be helpful in assisting staff attorneys in their selection of arbitrators for specific panels.

Party Input Into the Selection Of Arbitration. The parties to an arbitration also play a role in the selection of arbitrators. Parties are permitted one peremptory challenge per matter[27] and an unlimited number of challenges for cause.[28] For this ability to challenge to be effective, the parties to an arbitration must be provided with background information on the arbitrators. Until recently, in compliance with SRO rules,[29] both SROs provided the parties to the arbitration with only the names and business affiliations of the arbitrators. Both SROs also maintained a practice of providing the parties to arbitration, upon request, with whatever other non-personal information the parties requested about the arbitrators. The only information that staff attorneys appear to have denied to the parties with some regularity is information regarding the track records of arbitrators. In response to a request for such information, staff attorneys advise parties that such information is not kept or that such information would not be a satisfactory basis for a challenge for cause.

Both SROs have now decided to provide the parties with a more complete biographical history of each arbitrator. Both SROs had come to that decision prior to the Commission's recommendations for greater disclosure.[30] This more complete biographical history is taken from the profile cards that the SROs maintain on each arbitrator, as described earlier.

The majority of the staff attorneys interviewed recalled that peremptory challenges were employed by one or more parties in at least four to five of the last ten matters that the staff attorney supervised.

[27] Section 22 of the Code of Arbitration Procedure used by the NASD [NASD CAP] and Rule 609 of the Rules of Arbitration used by the NYSE [NYSE Rules] permit each party to an arbitration one peremptory challenge.

[28] Section 22 of the NASD CAP and Rule 609 of the NYSE Rules permit each party unlimited challenges for cause.

[29] Section 21 of the NASD CAP Procedure and Rule 608 of the NYSE Rules require that the parties to an arbitration be informed of the names and business affiliations of the arbitrators.

[30] SEC Recommendation Letter, *supra* note 13, at 6.

Two of the staff attorneys found that peremptory challenges were used only once or twice by the parties in the last ten matters the staff attorney supervised. One staff attorney found that peremptory challenges were not used at all in the last ten matters supervised. Parties to an arbitration do not need to give an explanation for using a peremptory challenge. Those staff attorneys who indicated a higher use of peremptory challenges, however, were asked what they believed motivated the use of the peremptory challenge by the parties. Most indicated that they believed that the parties or their counsel felt that not to use the peremptory would suggest that the parties or their counsel were not being sufficiently assertive in presenting their case. In other words, the use of the peremptory challenge was perceived almost as a badge of aggressiveness.

While the peremptory challenge was used with some frequency in a majority of the matters studied, the challenge for cause was reported by every staff attorney to be used only infrequently (one or two times out of the last ten matters administered). In addition, all staff attorneys indicated that they either always or generally granted a challenge for cause. Some staff attorneys noted that they would grant a challenge for cause to: "anything that sounds credible," "whenever there is any appearance of partiality," "whenever the parties seem uncomfortable." Most frequently, the challenges for cause are requested because the arbitrator's firm has represented one of the parties in a previous proceeding and the arbitrator was not aware of the conflict.

The limited use of the challenge for cause and the ready willingness of the staff to grant such challenges are significant findings. They suggest that the media's attention on conflicts in the arbitration system as well as the attention paid by the Commission in its recommendations regarding arbitration might be misplaced. The fact that parties to an arbitration request challenges for cause only once or twice per ten matters suggests that there is not a general perception that the arbitrators used by the SROs have conflicts which would make them partial. One might argue that the limited use of the challenge for cause also suggests that the parties to the arbitration are passive in regard to arbitrators selected regardless of whether they perceive the arbitrators to be in conflict positions. However, the frequent use of the peremptory challenge would indicate that the parties to the arbitration are not passive regarding the selection of arbitrators. The infrequent use of the challenge for cause also might indicate that the parties are unaware of the full nature of an arbitrator's background. However, staff attorneys indicate that parties and their counsel have historically asked for additional information about arbitrators when they had questions concerning the arbitrator's background. In other words, the parties and their counsel have not been

reluctant to seek the kind of information that would permit them to assert challenges for cause.

The data indicating that challenges for cause are virtually always granted is also significant. It would suggest that, once again, the perception that the arbitrators who are actually used are often in conflict with the interest of a party is not borne out by the practices of the parties and the staff attorneys. Of the staff attorneys interviewed, there were no instances reported where a party urged the exclusion of an arbitrator because of a perceived conflict where such exclusion was not granted.

Public perception of conflicts of interest can be damaging whether or not such conflicts exist. The fact that parties to arbitration generally do not perceive sufficient conflicts to warrant challenges for cause should be publicized. Similarly, the fact that challenges for cause regarding possible conflicts are usually granted might also be publicized. These data suggest that the arbitration system is far less afflicted by interest conflicts than what is perceived by the media.

Alternative Mechanism for Selection of Arbitrators by the Parties. Regardless of whether the perception is warranted, it is clear that both the media's[31] and the Commission's[32] perception is that the public is concerned with the partiality of arbitrators. There is no empirical study that has determined that the users of the arbitration system indeed are concerned with the partiality of arbitrators. However, it would not be unreasonable for the SROs, in the spirit of proactive responses to arbitration problems, to react to this perception of public concerns as though it were well founded. A certain method for reduction of party concern with the impartiality of arbitrators is to adopt a method for selecting arbitrators that relies to a greater degree upon public input than does the present method of arbitrator selection. As in some forms of commercial arbitration, the parties can be provided with lists of available arbitrators from the SRO arbitrator pools. One of the lists would include only industry arbitrators and the other list would include only public arbitrators. The parties would be provided with the biographical background of the arbitrators on the list. Arbitrators not acceptable to the parties could be scratched from the lists by the parties. Those arbitrators who survive the elimination process by both parties would be eligible to sit. As with current panels, a majority of the arbitrators would come from the list of public arbitrators. The staff attorney would contact the eligible arbitrators to see who would be available on a specific data. Unless it were argued that the pool of arbitrators from which the selections were made was partial, the parties could not claim that the arbitrators selected were necessarily biased.

[31] Zigas, *supra* note 14; Glaberson, *supra* note 14.

[32] *See* SEC Recommendation Letter, *supra* note 13, at 2-4.

This system of party selection of arbitrators is similar to one of the arbitrator selection methods offered by the American Arbitration Association in its Securities Arbitration Rules.[33] Another selection method offered by the American Arbitration Association involves a tripartite selection process in which each party selects an arbitrator and then the two selected arbitrators in turn select a third arbitrator.[34] This tripartite selection method would be less consistent with the securities arbitration system currently operated by the SROs since the party-appointed arbitrators would not necessarily have the same commitment to neutrality that SRO arbitrators currently have.

All of the staff attorneys interviewed were asked whether they would prefer a method of arbitrator selection such as the one described above in which the parties are provided with lists from which to make selections. Virtually every staff attorney commented that such a selection process would delay the arbitration hearings to a considerable degree. Indeed, it is likely that if the selection lists were not of adequate length, the number of arbitrators mutually acceptable to both parties would be too limited to insure the availability of acceptable arbitrators for a specific date. It is possible that with a system for public selection of arbitrators, the SROs would have to set the arbitration hearing dates well in advance in order to make it less likely that the acceptable arbitrators would have scheduled other commitments at the time that they were advised of their selection for a specific panel. Obviously, there would be some hearing delays that would have to be endured by the parties to the arbitration. This administrative inconvenience might be a necessary trade-off for reducing the potential of public concern with arbitrator partiality. And, indeed, most of the staff attorneys interviewed suggested that a party selection process would give the parties a greater sense of control over the arbitration system and perhaps a greater sense of comfort with the impartiality of the system.

Discovery

Methods of Discovery Available. Discovery within securities industry arbitration is clearly less extensive than in federal litigation. However, discovery in arbitration is far from nonexistent. The arbitration rules of the SROs provide for voluntary exchanges of documents,[35] subpoena of documents and of persons as permitted by applicable state law,[36] order of appearance,[37] and order for production of documents in possession of

[33] SECURITIES ARBITRATION RULES § 13 (American Arbitration Association 1987).
[34] *Id.* § 14.
[35] Section 32(b), NASD CAP; § 619(b) NYSE Rules.
[36] Section 32(a), NASD CAP; § 619(a) NYSE Rules.
[37] Section 33, NASD CAP; § 620 NYSE Rules.

SRO members or employees of such members.[38] In addition, when both parties are in agreement, other methods of discovery can be utilized. Staff attorneys interviewed for this study noted that, in infrequent instances, parties have mutually agreed to interrogatories, depositions, and prehearing conferences. As part of its discovery process, one of the SROs now requires that if requested documents have not been provided to the opposing party within ten days of a hearing, the arbitrators may exclude the use of such documents by the party which failed to provide them.[39]

Frequently Requested Documents. For many of the controversies that are brought to arbitration at the SROs there are several categories of documents that will be valuable in the preparation of the respective cases of the parties. The production of these documents will typically be requested by the well prepared counsel during discovery. Which documents are requested will depend upon the nature of the controversy. Documents noted by the staff attorneys as being frequently requested by claimants during discovery include: confirmations, account statements, order tickets, new account forms, the compliance manual of the respondent firm, prospectuses distributed by the respondent, respondent's holding lists and cross reference ledgers, and disciplinary records of the respondent account executive. Documents noted by the staff as being frequently requested by respondents during discovery include: claimant's tax returns, previous account information of the claimant, and claimant's bank statements. The consistency with which some of these documents are requested in certain types of cases suggests that it would be possible for the SROs to prepare an information pamphlet describing the types of materials that might be useful in the preparation of certain types of cases. Such a pamphlet would be helpful for the pro se parties (both claimant and, occasionally, respondent) who need guidance on how to prepare an effective case. For parties represented by counsel, the pamphlet might also prove helpful. Staff attorneys indicated that once or twice per ten matters, parties discovered that they had not requested documents during discovery that were necessary to prepare an effective case. When asked why there was this failure to request these necessary documents, the staff attorneys often explained that the parties or their lawyers were unfamiliar with the documents that would be available in a case such as the one being arbitrated. The pamphlet might expedite the discovery process and reduce time-consuming arguments. It would not only provide guidance to both sides as to the kind of materials they might seek to examine but also provide guidance as to kinds of materials for which they might anticipate legitimate discovery requests.

[38] *Id.*

[39] Section 638, NYSE Rules.

The downside of preparing an informational pamphlet is that it might encourage gratuitous requests for documents during discovery. The party or counsel that seeks to be aggressive might interpret such a pamphlet to be a green light for excessive discovery requests. The likelihood of such misuse of discovery could be diminished by an introduction to the pamphlet which would explain that: 1) the function of discovery in arbitration is to seek out and obtain relevant information and not to harass the opposing party; and 2) arbitrators might look unfavorably upon the use of discovery for harassment purposes.

Obviously, the risk that the pamphlet would in some instances encourage the misuse of discovery would remain. Balanced against this risk would be the advantage of a more expeditious discovery process.

The Use of Voluntary Exchange. While staff attorneys indicated that parties frequently request documents through a process of voluntary exchange, some staff attorneys indicated that the parties were at times unaware of the voluntary exchange process while other staff attorneys noted their own reluctance to strongly urge parties to comply with the voluntary exchange process. This reluctance, when it was expressed, seemed to reflect a general hesitation of staff attorneys to "tell the parties what to do." This author believes that the hesitation expressed reflects an excessive desire on the part of the staff attorneys to maintain total neutrality in the arbitration process.

Some staff attorneys appear to be more willing to aggressively encourage the parties to engage in productive voluntary exchanges. Some staff attorneys indicated that they inform parties that if they do not engage in voluntary exchanges there could be delays in the hearings or the arbitrators might be upset with the lack of cooperation by a party. Some staff attorneys tell parties that failures to engage in voluntary exchanges could produce an appearance that a party is attempting to hide critical evidence.

The voluntary exchange process is a crucial method for expediting discovery. A refusal by the parties to comply with a voluntary exchange often necessitates involvement of the arbitrators prior to the hearing and/or the exchange of subpoenas. Frequently, the arbitrators are totally unfamiliar with the controversy during the period of discovery and there is considerable time lost both in educating the arbitrators and in obtaining their guidance regarding the mandatory production of documents. Some arbitrators might also be unfamiliar with their authority within the discovery process. Time needs to be spent educating the arbitrators on these matters as well.

Undoubtedly some controversies are sufficiently complicated and dependent upon paper production to guarantee that a process of voluntary exchange of documents will not resolve all of the outstanding disagreements between the parties regarding discovery. There can be

sophisticated issues of relevance and privilege over which the parties may legitimately disagree. Even relevant discovery requests might be excessively burdensome. In these controversies, the pre-hearing involvement of arbitrators might be critical. It might be desirable to set up a pre-hearing conference to resolve these discovery issues. The Securities and Exchange Commission has recommended that the securities industry consider introducing a practice of pre-hearing conferences for these more complicated cases.[40]

For a great number of controversies, however, document production requests should be able to be handled by the staff attorney within the framework of voluntary exchange. The staff attorney is in charge of administering a unique dispute resolution process. The staff attorney is an employee of an SRO whose members find it beneficial to resolve their controversies by arbitration. The claimants have brought their controversies to the SRO because they are seeking the adjudicatory protections of the arbitration system. Both of the parties are essentially seeking a benefit from the arbitration system. It is consistent with the needs of the parties for the staff attorney to strongly encourage the voluntary exchange of documents. The approach taken by those staff attorneys who have provided this encouragement—the suggestion made to the parties that noncooperation will lead to delays and unattractive appearances of stonewalling—should be utilized by all staff attorneys. The use of voluntary exchanges should perhaps be highlighted in the introductory materials sent to all of the parties. Furthermore, the parties should be advised that the staff attorneys are authorized to aggressively seek the cooperation of the parties in the voluntary exchange process.

Improvements in Discovery—The Staff Attorney's Perspective. All of the staff attorneys interviewed at one of the SROs found the discovery process to be helpful to the advancement of the resolution of the controversy. Half of the attorneys interviewed at the other SRO found the discovery process helpful. When the staff attorneys perceived the discovery process as being unhelpful it was because the discovery requests were too broad. Parties were perceived to employ a shotgun approach. Documents were asked for by parties even when those documents were already in the hands of the party so requesting. When discovery was perceived by the staff attorneys to be helpful, it was generally because the staff attorneys thought that discovery was useful in allowing the parties to meet their burden of proof and crystallizing issues.

The fact that some parties make unnecessary use of discovery is prob-

[40] SEC Recommendation Letter, *supra* note 13, at 10. In March, 1988, the Securities Industry Conference on Arbitration developed a rule, to be presented to the SROs, requiring a pre-hearing conference in certain disputes.

ably a partially noncorrectable operational flaw of any dispute resolution system in which the parties to the controversy are responsible for securing the information necessary for presenting an effective case. More aggressive involvement of staff attorneys, or earlier involvement of arbitrators in the more complicated controversies, might diminish production requests for superflous documents. Parties might be advised that arbitrators will look unkindly upon instances in which it can be demonstrated that discovery requests were utilized for harassment purposes. The burden of alerting the staff attorney or arbitrators to the superfluous character of certain document requests should rest with the party receiving the request. However, knowledgeable staff attorneys or arbitrators will often have sufficient knowledge, without such advice, to recognize such a request through their own inquiries.

When asked about changes that should be made to the discovery process, approximately one third of the staff attorneys interviewed felt that the discovery process should not be expanded because the expeditious nature of arbitration might be lost. Some staff attorneys thought that the discovery process should not be expanded but that the SRO rules should be amended to permit the sanctioning of parties who fail to cooperate in the discovery process.[41] Of those staff attorneys who thought that the discovery system could be amended and expanded in scope, suggestions for such expansion included:

> 1) utilization of pre-hearing conferences to resolve disputes involving production obligations and witness exchanges in discovery as well as an attempt to determine the major issues that will be examined during the hearings;
> 2) permitting depositions of the actual parties in a controversy in order to eliminate time-wasting testimony at the hearings;
> 3) permitting depositions only of parties who would be unable to attend the hearings because of illness or other compelling reason;[42]
> 4) permitting limited admissions or interrogatories, again to narrow the scope of the testimony at the hearings; and
> 5) providing for pre-hearing delivery of documents ordered exchanged.[43]

It is interesting to note that none of the staff attorneys interviewed suggested a complete overhaul of the discovery process. In each instance in which revisions were suggested, the recommended expansion was to

[41] *See supra* text accompanying note 39, for discussion of the NYSE rule which applies some sanctions for noncooperation during discovery.

[42] The Commission made a similar recommendation in its proposal to the SROs. SEC Recommendation Letter, *supra* note 13, at 10.

[43] Since the preparation of this article, the Securities Industry Conference on Arbitration has proposed a rule requiring the prehearing delivery of documents. Versions of this rule have been considered for adoption by the SROs.

be restricted by some limiting factor such as limiting depositions only to the actual parties in the controversy or persons who cannot attend the hearings. One might conclude that the administrators of the arbitration program do not have in mind an obvious alternative approach that would be dramatically different in nature from the present discovery process.

Improvements in Discovery—Counsel's Prospective. Twenty attorneys who regularly use the securities industry arbitration system responded to the author's discovery questionnaire. While the author controlled neither the selection of the attorneys to whom the questionnaires were mailed nor, of course, the selection of the attorneys who responded to the questionnaire, it was understood by the SROs that the attorneys chosen were to represnt a sampling of both customer and broker-dealer attorneys who regularly utilize the arbitration process. The responses to the questionnaires were generally thoughtful and comprehensive. As will be clear from the discussions below, the completed responses reflected neither a bias in favor of the conduct of the arbitration process nor in favor of the securities industry.

Of the twenty respondents, fourteen had at least one problem with the effectiveness of the current discovery process in terms of being able to obtain, prior to arbitration, the materials and information necessary to present the case effectively. In twelve of the fourteen instances in which a respondent had a problem with discovery, that problem was with the non-production or the late production of documents. In five instances, the respondent's criticism was directed against the brokerage industry for stonewalling or delaying in the production of documents. The difficulties in obtaining a timely production of documents is a pressing concern to the sampling of attorneys who participated in this study. In some regards, this focus of concern on document production is surprising. Document production is an element of traditional discovery. The SRO rules provide for document production by means of voluntary exchanges, subpoenaes, and production orders. There are other elements of traditional discovery—such as depositions, interrogatories, and admissions—for which the SRO rules do not make provisions. The problems that users of the arbitration mechanism are experiencing relate almost entirely to the discovery procedures for which provisions are made rather than the discovery procedures that are unavailable. This data suggests that the SROs need to explore methods to insure complete and timely production of documents. As discussed before, one method for improving document production is through a more aggressive role of the staff attorney in the process of voluntary exchange.

Sixteen of the twenty respondents to the counsel survey thought that discovery in arbitration could be broadened with reasonable limitations

placed upon the expansion. Thirteen of those who thought that discovery could be broadened suggested that parties be allowed to take depositions. Various limitations were suggested on the number and length of depositions. Some suggested an absolute limit on the number of depositions that could be taken, such as one or two per side. Others suggested that depositions be allowed to be taken only of the named parties (or of the account executive or supervisor of the named brokerage firm) or of those parties approved by the arbitrators. Many indicated that they believed that the use of depositions would shorten the hearings and encourage pre-hearing settlements. Other suggestions included:

1) permitting the use of interrogatories with a number limitation;
2) appointment of a "discovery master" to resolve, prior to the hearing, motion controversies and discovery claims;
3) holding pre-hearing conferences to resolve discovery issues;
4) requiring brokerage firms to disclose personnel and disciplinary files; and
5) requiring parties to exchange lists of documents and experts they intend to use prior to the hearing.

It is the parties who use the discovery process who ultimately are the best judges of whether the system allows them to gather the informa tion they needed to present their cases effectively. The attorneys sampled in this survey found the present document exchange system to be lacking and thought that a limited number of depositions could be allowed each side without undermining the unique nature of arbitration. The SROs should consider investigating a broader sample of attorney users of the arbitration system to see if the findings of this sample are representative of the broad class of arbitration users. Such findings could provide the SROs with useful guidance on how their discovery procedures might be enhanced.

CONCLUSION

There are two ways by which this study can serve to advance securities industry arbitration. First, from the data that was collected and the analysis that was conducted, observations have been made and recommendations have been generated concerning specific operational features of securities arbitration. It is hoped that these observations and recommendations might serve as a basis for further discussions regarding improvements in the current arbitration system. Second, beyond providing these observations and recommendations, the study has also provided a framework for analysis that can be followed in future examinations of securities industry arbitration. There are many other areas of securities arbitration to investigate and numerous questions to explore. There recently has been considerable comment regarding problems with

securities arbitration and appropriate solutions. Much of this comment has been based upon anecdotal information. More empirical analysis needs to be conducted to investigate the drawbacks of the present operation of securities arbitration and to devise solutions that will work and that will be found acceptable to the parties who are using the system.

Without restating all of the findings and recommendations of the study, it would be useful to reemphasize the following:

- An effective, ongoing written evaluation process of all arbitrators is critical for maintaining a well-qualified arbitrator pool. The evaluation process should be based upon a checklist of possible strengths and weaknesses by which all arbitrator performances could be reviewed. A few simple bottom-line rankings should be used to indicate whether an arbitrator is an attractive candidate for future service. Maintaining an effective ongoing written evaluation system is essential, in part, because it is difficult to know how well arbitrators will perform prior to service at a hearing. A formal, written evaluation procedure is also important because, with increasing numbers of arbitrators and with turnover on the SRO staffs, informal, word-of-mouth evaluation systems will become less reliable.

  Because initial selection techniques are not viewed as good indicators of ultimate arbitrator performance and because SROs must ultimately rely upon ongoing evaluations for quality control of arbitrators, SROs should initially cast as broad a net as possible to develop their arbitrator pools.
- The high percentage of attorneys in the arbitrator pools suggests an appreciation of the need for legal analysis, rather than purely commercial wisdom, in arbitrator decisions. At the same time, the fact that not all arbitrators are attorneys raises concerns that non-attorneys will at times be deciding matters involving complicated securities law issues.
- The average length of service of arbitrators needs to be increased. The fact that arbitrators are serving for only three or four years suggests that the average arbitrator discontinues serving as an arbitrator around the same time that he or she is becoming experienced. The SROs need to consider how to entice experienced arbitrators to extend their service.
- The fact that challenges for cause are rarely made by the parties to arbitration and that when they are made they are virtually always granted, suggests that the media perception holding that customer/claimants frequently find arbitrators to be in a conflict position is unwarranted.
- While much of the training of arbitrators is by necessity informal, some of the informal aspects should be codified. Staff attorneys regularly provide arbitrators with a brief review of procedures immediately before each hearing. The materials to be

included in such briefings should be included in a procedural manual that staff attorneys would refer to when so advising arbitrators.

Arbitrators should be provided with briefing papers concerning substantive issues with which arbitrators must frequently deal, such as punitive damages, attorney fees, and RICO issues. The briefing papers should be neutral as to position and should be utilized for background purposes.

- Staff attorneys do not sufficiently encourage parties to utilize an accessible and valuable tool for document production—voluntary exchange.
- The SROs should provide the parties to arbitration with descriptions of the type of materials that each side might want to obtain during discovery in order to best prepare each side's respective case. Such lists might speed discovery and help insure well prepared cases.
- A sampling of attorneys who regularly represent parties in arbitration suggests that their greatest problem with arbitration discovery is the inefficiency of the discovery that is available, i.e., document product, rather than the fact that many aspects of judicial discovery—e.g., depositions, interrogatories, admissions—are not available in securities arbitration. This data suggests that the SROs might want to reexamine the operation of discovery as a tool for providing document production.
- A majority of the sampling of attorneys who regularly represent parties in arbitration would prefer some limited form of depositions to be introduced into the arbitration discovery process.

These observations and recommendations are viewed as discussion points that perhaps will need to be modified as further data is collected and further comment is received from interested parties. In order to generate this data and to stimulate informed comment, it is important that further studies be conducted to determine the precise operation of the arbitration system. There is a need to probe current operations, in order to determine where there are inconsistencies, missing elements, or beneficial procedures that need to be expanded. The users of the arbitration system should be further consulted as to what they find valuable in the system and what they find lacking. Too frequently, our evaluations of arbitration appear to be grounded upon anecdotal information. If we are intent upon improving the arbitration process, we must fully understand its operations.

Appendix A

Item 1
Securities Industry Arbitration Study
Professor David A. Lipton

Subject SRO: NASD NYSE

Interview/Self Completion (circle)

Date of Interview or Date of Self-Completion _____

Party Interviewed or Self-Completion: _____

Selection and Training of Arbitrators

II.A. Selection of the Pools.

Procedure for Completing this Form: Researcher to interview (by phone or in person) individual or individuals responsible for selecting the pools.

Information Sought:

1. How are the pools organized? Regions? One Pool?

2. Approximate numbers in pools? Approximate number nationally?

3. Procedures for selecting members of the pools (both formal and informal)? Identify party or parties responsible for selection.

4. Criteria for selection of members of the pools (formal and informal)? What qualities are attractive? What candidates are rejected?

5. Is there a weeding out process (formal or informal) of arbitrators after they have sat on one or more panels?

6. Relevant comments not covered above:

Appendix B

Item 2
Securities Industry Arbitration Study
Professor David A. Lipton

Subject SRO: NASD NYSE

Interview/Self Completion (circle)

Date of Interview or Date of Self-Completion: _____

Party Interviewed or Self-Completion: _____

Selection and Training of Arbitrators

II.B. Selection of the Panels

Procedure for Completing this Form: Researcher to interview (by phone or in person) staff attorneys (number to be determined) responsible for selecting the pools. Forms may also be self-completed.

Information Sought:

1. How are specific members of arbitration panels chosen?
    a. What office policies are followed?

    b. What formal or informal staff attorney practices are followed?

2. How does previous experience of the arbitrators impact upon selection?
    a. What factors are considered?

    b. How are these factors recalled and evaluated? Written? Word of mouth?

3. Relevant comments not covered above:

Appendix C

Item 3
Securities Industry Arbitration Study
Professor David A. Lipton

Subject SRO: NASD NYSE

Interview/Self-Completion (circle)

Date of Interview or Date of Self-Completion: _____

Party Interviewed or Self-Completion: _____

Selection and Training of Arbitrators

II.C. Profile of Arbitrators (Creating and Maintaining)

Procedure for Completing this Form: Researcher to interview (by phone or in person) individual or individuals who maintain profiles on arbitrators. Forms may also be self-completed.

Information Sought:

1. What information is entered onto an arbitrator's biography when selected for the pool?

    a. Does the SRO keep a profile record of arbitrators when they are selected for the arbitrator pool?

    b. Nature of information kept on arbitrators? Employment? Prior work experience? Education? Involvement with securities industry? Knowledge of securities law?

2. What information is entered onto an arbitrator's profile record after he has sat on a panel?

    a. What kind of information do you enter as a result of perceived office policy?

    b. What kind of information do you enter onto profile records in accordance with your personal practices? Comments about person?

3. Other relevant comments.

Appendix D

Item 4
Securities Industry Arbitration Study
Professor David A. Lipton

Subject SRO: NASD NYSE

Interview/Self Completion (circle)

Date of Interview or Date of Self-Completion: _____

Party Interviewed or Self-Completion: _____

Selection and Training of Arbitrators

II.D. *Training of Arbitrators*

Procedure for Completing this Form: Researcher to interview (by phone or in person) parties responsible for administering formal training program and staff attorneys (numbers to be determined). The staff attorneys need only answer questions 2.a, b, and c, below.

Information Sought:

1. Describe any formal or informal training programs administered by your SRO prior to arbitrators actually serving on panels.
    a. Videos or lectures?
    b. Written materials regarding arbitration generally?
    c. Written materials regarding arbitration procedures of your SRO specifically (i.e., rules, scripts, etc.)
    d. Oral education by phone or in person?
2. Describe any formal or informal training procedures incorporated in connection with the conduct of a specific arbitration.
    a. What type of instructions do the staff attorneys provide arbitrators prior to the initiation of the arbitration regarding the operation of an arbitration?

b. Are attempts made to mix panels between experienced and inexperienced arbitrators?

c. What kind of information regarding operation of an arbitration does the staff attorney provide during the arbitration?

Appendix E

Item 5
Securities Industry Arbitration Study
Professor David A. Lipton

Subject SRO: NASD NYSE

Interview/Self Completion (circle)

Date of Interview or Date of Self-Completion: _____

Party Interviewed or Self-Completion: _____

Selection and Training of Arbitrators

II.E. & F. Transmission to the Parties of Information Regarding Arbitrators' Background and Party Involvement in the Selection of Arbitrators

Procedure for Completing this Form: Researcher to interview (by phone or in person) staff attorneys (numbers to be selected) responsible for selecting panels. Forms may also be self-completed.

Information Sought:

1. What information regarding the background of arbitrators does SRO policy advise be provided to parties to the arbitration?

2. What additional information regarding the background of arbitrators do you provide parties to the arbitration?

3. What information regarding the background of arbitrators do parties to the arbitration request from the staff attorney which is not provided to them?

   a. Questions asked.

b. Response to request?

4. How frequently are peremptory challenges employed by the parties (Frequently, Infrequently, Not at all)? To help you answer this question, mentally review the last ten arbitrations that were completed under your direction or for which you shared responsibility. Were peremptory challenges not made at all, one or two times (Infrequently), four or more times (Frequently)?

Frequently Infrequently Not At All

5. How frequently are challenges for cause raised by the parties (Frequently, Infrequently, Not at all)? To help you answer this question, mentally review the last ten arbitrations which were completed under your direction or for which you shared responsibility. Were challenges for cause raised not at all, one or two times (Infrequently), four or more times (Frequently)?

a. Frequently Infrequently Not At All.

b. What is the most common challenge for cause?

6. When challenges for cause are raised how often are they granted? Generally (half or more than half of the time)? Generally Not (less than half of the time)? Not at all?

Generally Generally Not Not At All

7. What factors will motivate you to accede to a challenge for cause?

8. What factors will motivate you to deny a challenge for cause?

9. One suggestion that has been made regarding the selection of arbitrators is that parties be permitted to select their own arbitrators from a pool of qualified arbitrators as is typically the practice at the American Arbitration Association.

a. What do you perceive to be the downside of such a procedure?

b. What do you perceive to be the benefits of such a procedure?

Appendix F

Item 6
Securities Industry Arbitration Study
Professor David A. Lipton

Subject SRO: NASD NYSE

Interview/Self Completion (circle)

Date of Interview or Date of Self-Completion: _____

Party Interviewed or Self-Completion: _____

Selection and Training of Arbitrators

I.A., B. & C. Discovery Rules, Typical Information Sought by Parties, Discovery Techniques Typically Employed by Parties

Procedure for Completing this Form: Researcher to interview (by phone or in person) staff attorneys who have administered arbitrations involving discovery practices. The Form may also be Self Completed.

Information Sought:

1. What discovery vehicles are available to the parties through SRO rules and/or state law?

2. What informal discovery procedures, not covered by SRO rules or statute, have been requested by parties (e.g., interrogatories, admissions, etc.)? To assist you in answering this question, mentally review the last ten matters you have closed or in which you have participated in closing.

    a. Have you denied such requests and if so why?

    b. Have you granted such request and if so why?

3. Do parties request voluntary exchange of documents from opposing parties (Frequently, Infrequently, Not at All)? To assist you in answering this question, mentally review the last ten matters you have closed or in which you have participated in closing. Frequent requests would

constitute four or more requests in ten matters. Infrequent would constitute one or two requests in ten matters. Not At All would be no requests.

Frequently Infrequently Not At All

4. Do you require a voluntary exchange of documents in response to a request (Yes and No, Always Yes, Always No)?

Yes and No Always Yes Always No

a. When you deny such a request, your reasons include the following:

b. When you grant such a request, your reasons include the following:

5. Indicate the six documents or types of documents most frequently requested by claimant/customers in preparation of effective cases.

6. Indicate the six documents or types of documents most frequently requested by respondent/broker (brokerage firm) in preparation of effective cases.

7. How frequently do parties to arbitration make some request for pre-arbitration discovery (Frequently, Infrequently, Not At All)? To assist you in answering this question, mentally review the last ten matters you have closed or in which you have participated in closing. Frequent requests would constitute four or more requests in ten matters. Infrequent requests would constitute one or two requests in ten matters. Not At All would be no requests.

Frequently Infrequently Not At All

8. Do parties generally obtain the documents they seek in discovery? Generally (half or more than half of the time), Generally Not (less than half of the time), Not At All?

Generally Generally Not Not At All

9. When parties do not obtain the documents they seek in discovery, it is generally because?

10. List in descending order the most frequently used vehicles for discovery employed in arbitration. Voluntary exchange of documents, subpoenas, interrogatories, others.

11. In your opinion, is the information obtained in discovery generally helpful to parties in preparation of effective cases or generally not helpful to parties in preparation of effective cases?

    a. Helpful Not Helpful
    b. Explain why?

12. Do parties in arbitration find during the hearings that there are documents which they need to prepare their cases which they might have obtained in discovery but which they did not seek to obtain (Frequently, Infrequently, Not At All)? To assist you in answering this question, mentally review the last ten matters you have closed or in which you have participated in closing. Frequently means that these events occurred four or more times in the ten matters. Infrequently means that these events occurred one or two times in the ten matters. Not At All means that these events did not occur at all.

    Frequently Infrequently Not At All

13. When parties fail to request a document during discovery which later turns out to be important during hearings, it is because of:

    a. lack of familiarity with nature of case;

    b. lack of familiarity with discovery rules;

    c. unpredictable direction of hearings;

    d. other _____

14. When discussions occur concerning the expansion of discovery in arbitration, concern arises that, with unlimited discovery, arbitration will no longer be more expeditious than litigation. Do you perceive ways in which expanded discovery (such as the use of interrogatories and greater document exchange) may be offered to parties and yet with effective reasonable limitations placed upon the use of such discovery methods? Describe such limitations.

15. If you were to offer parties to arbitration some element of additional discovery procedure, what would that be?

APPENDIX G

Item 3.1
Securities Industry Arbitration Study
Professor David A. Lipton

Subject SRO: NASD NYSE

Interview/Self Completion (circle)

Date of Interview or Date of Self-Completion: _____

Party Interviewed or Self-Completion: _____

Selection and Training of Arbitrators

II.C.1. Profile of Arbitrators (Sampling)

Intended Scope of Sampling: Seeking information regarding a pool of ninety (90) randomly selected arbitrators from a representational geographic pool. For example, for the NASD, it is intended to examine arbitrator profile cards from arbitration pools in nine cities. Three cities per region will be examined with a greater number of arbitrators selected randomly from the cities with the larger pools. For each arbitrator profile card examined, the information below will be collected.

Information Sought:

1. Briefly describe the method of selection of arbitrators studied in this sampling. (Note: This item needs to be completed on only one form per self-completion.)

2. Identify arbitrator by first two letters of last name of arbitrator. If there are duplications, add numerals thereafter (e.g., SM, SM1, SM2).

3. Indicate geographic location in which arbitrator serves.

4. Indicate whether arbitrator is *industry* or *non-industry*. (circle one)

5. Indicate whether arbitrator is an *attorney* or *non-attorney*. (circle one)

6. For non-industry, non-attorney arbitrators, indicate current occupation (include retirement as an occupation).

    a. N/A because either industry or attorney.

    b. Occupation: _____

7. For non-industry, attorney arbitrator, indicate type of employer for whom arbitrator works (e.g., law firm, business, academia, consultant, other).

    a. N/A becaue either industry or non-attorney.

    b. Nature of employer: _____

8. For non-industry arbitrators indicate whether employer does compensated work for the securities industry.

    a. N/A because industry.

    b. Applicable but cannot determine.

    c. Does work compensated by the securities industry.

    d. Does not do work compensated by the securities industry.

9. Indicate number of years of professional occupational experience of arbitrator.

    a. Do not know.

    b. Number of years is: _____

10. Indicate number of years arbitrator has actively served on panels for this SRO.

a. Do not know.

b. Number of years is: _____

11. Indicate number of matters for which arbitrator has sat upon panels for this SRO.

a. Do not know.

b. Number of panels is: _____

APPENDIX H

ARBITRATION SURVEY QUESTIONNAIRE

Name (Optional): _____

Firm (Optional): _____

Position: _____

1. Number of years during which you have represented client(s) in arbitration: _____

2. Approximate number of arbitrations in which you have served in a representational capacity: _____

3. Which discovery procedures have you utilized in arbitration in order to gather documents, information or testimony (e.g., voluntary exchange, order of production, subpoena, depositions, others)?

4. How effective did you find the discovery process to be in allowing you to obtain, prior to arbitration, the materials and information you believe were necessary to present your case?

5. What discovery procedures would you have utilized were they available and how would these procedures have been advantageous to the preparation of your case?

6. A frequently voiced concern with expanding the scope of discovery is that the expediency and efficiency of arbitration might be lost. A response to that concern is that the expansion of discovery need not be open-ended. Were you to envision an expansion of the scope of discovery, are there limitations that could be placed upon the expan-

sion that would be acceptable? (A discussion of such limitations is appropriate only if: 1) you believe that the scope of discovery should be expanded, and 2) you believe that limitations should be placed upon such expansion.)